

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 328/08  
5129459

BETWEEN                      DONNA SYME  
   Applicant

AND                              CHIC-ONE LIMITED t/as  
   Smart Tops Hair and Beauty  
   Salon  
   Respondent

Member of Authority:        R A Monaghan

Representatives:              M Nutsford, Advocate for Applicant  
   No appearance for Respondent

Investigation Meeting:        17 September 2008

Determination:                18 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Chic-One Limited (“Chic-One”) employed Donna Syme as a senior stylist in its ‘Smart Tops Hair and Beauty Salon’. Ms Syme says she was dismissed unjustifiably and seeks remedies in respect of her dismissal, as well as wages and holiday pay outstanding as at the date of dismissal.

**Preliminary matter**

[2] Chic-One did not file a statement in reply. When the Authority attempted to arrange a conference call to discuss that, as well as other case management matters including the possibility of mediation and the scheduling of an investigation meeting, its working director advised that another of the directors would be handling the matter. The Authority attempted to make contact with the named director, but he did not respond.

[3] This lack of response indicated it was unlikely that mediation would contribute constructively to a resolution of the problem. An investigation meeting was set down and a notice of meeting was sent to both parties. It was accompanied by a letter setting a schedule for the filing of statements from witnesses. The working director acknowledged receipt of the package which contained these documents.

[4] No witness statements were filed on behalf of Chic-One.

[5] Chic-One did not attend and was not represented at the scheduled meeting. The start time was delayed while the Authority attempted to ascertain Chic-One's intentions. It was unable to make contact with any representative.

[6] Schedule 2, clause 12 of the Employment Relations Act 2000 applies in these circumstances. No cause has been shown for Chic-One's failure to attend or be represented at the meeting. I have therefore proceeded to act as fully in this problem as I would if Chic-One had attended or been represented.

### **The parties' employment relationship**

[7] Ms Syme's employment began on 4 December 2007. There was no written employment agreement, but Ms Syme accepted that by agreement her employment included a three-month trial period. Her hours of work were Monday – Friday, 10 am – 6 pm. Her rate of pay was \$25 per hour.

[8] Ms Syme is an experienced stylist, and believed her skills and assistance were sought because the owners and operators of the business did not have industry experience. She believed she would be contributing to the refurbishment of the salon and the expansion of the business. However she came to believe that talk of this kind had amounted to 'dangling carrots'. She also came to recognise that the working relationship with Rosalie Hakaraia, the working director, was deteriorating. She believed the turning point had come in a discussion about the ordering of professionally prepared business cards. Otherwise she was unaware of precisely what was of concern to Ms Hakaraia.

[9] The only information available to the Authority regarding Chic-One's position was contained in a letter dated 28 April 2008. It was provided to Ms Syme's representative, who provided it to the Authority. The letter was from Ms Hakaraia. In it Ms Hakaraia said she had spoken to Ms Syme on five occasions regarding her punctuality and the way in which she spoke to staff members. Ms Syme responded badly. No further details were set out.

[10] Ms Syme denied being spoken to about concerns of this kind, and denied having any knowledge of the matters referred to. In the absence of any evidence from Chic-One, I accept Ms Syme's denials.

[11] On Monday 3 March 2008, Ms Syme was an hour late to work. She had slept in after attending a farewell function the night before. She had sent a text message advising she would be late, and said that when she arrived at work she began her duties without receiving any comment.

[12] However Ms Hakaraia asked to speak to her at about 3.30 pm that day. Ms Hakaraia told Ms Syme she was 'going to have to let you go' and the working relationship was 'not working out'. Ms Hakaraia also told Ms Syme the other staff did not like her, before accusing her of coming in to work half drunk that day and of having lost control of her life. She referred to the fact that Ms Syme had been reading a spiritual book about addiction. Ms Syme characterised the conversation as 'not very nice.' She said to Ms Hakaraia 'are you firing me'? Ms Hakaraia said 'yes'.

[13] In the letter of 28 April, Ms Hakaraia said the conversation was intended as a 'first verbal warning for punctuality.' Ms Syme became angry and abusive, and decided to leave.

[14] Ms Syme said she did become angry, but that was after she had been spoken to in the terms she described. She went outside to cool off, before returning to ask whether she was required to work her two-week notice period. Ms Hakaraia advised she would consult with her family. Ms Syme left, and awaited a response from Ms Hakaraia. She did not receive a response, although she sought to make further enquiries, and did not return to work.

[15] In the absence of any evidence from Chic-One, I accept Ms Syme's account of the events of 3 March.

### **Was there a dismissal?**

[16] There is reference in the 28 April letter to a view that Ms Syme had abandoned her employment.

[17] On the facts as I have found them, there was no abandonment. There was a dismissal on 3 March.

### **Justification for the dismissal**

[18] There was no evidence to support the reasons Ms Syme said she was given for her dismissal. There was nothing to establish the reasons had substance, and they were not put to Ms Syme in any form permitting discussion or explanation. The dismissal itself was predetermined.

[19] The dismissal was not justified. Ms Syme has a personal grievance.

### **Remedies**

[20] Ms Syme seeks the reimbursement of remuneration lost as a result of her personal grievance. She is entitled to that remedy under s 123 of the Employment Relations Act.

[21] She obtained alternative employment, at a lower rate of pay, commencing on 1 April 2008. Accordingly she was out of work for 4 weeks. The remuneration lost in that period is  $4 \times \$925 = \$3,700$ .

[22] Ms Syme also seeks reimbursement for a further two-month period in respect of the difference between her remuneration at Chic-One and her remuneration in the new position. The amount is calculated as:  $[8 \times \$925] - [8 \times \$592] = \$2,664$ .

[23] In determining an award in respect of any remedy I must consider the extent to which Ms Syme contributed to the situation giving rise to the grievance, and, if those actions so require, reduce the remedies that would otherwise have been awarded. Ms Syme should not have been late for work on 3 March. However on her account the lateness was only one of many factors leading Ms Hakaraia to conclude Ms Syme would 'have to go'. In the circumstances I doubt that the single instance of lateness made any material difference to the decision to dismiss, and I do not consider it necessary to go as far as imposing a reduction in respect of it.

[24] Chic-One is therefore ordered to reimburse Ms Syme in the sum of  $\$3,700 + \$2664 = \$6,364$ .

[25] The other remedy sought in respect of the personal grievance is compensation for injury to feelings. There was evidence that Ms Syme suffered such injury. Chic-One is ordered to compensate Ms Syme for that injury in the sum of \$4,000.

### **Wages and holiday pay**

[26] Ms Syme was not paid for working on 3 March. Since she was 1 hour late, and her paid working day appears to have been 7.5 hours, she is entitled to payment calculated as  $6.5 \times \$25 = \$162.50$ .

[27] The agreed entitlement to annual leave was 4 weeks per year. Ms Syme says she did not take any paid annual leave during her employment. She is therefore owed holiday pay calculated as  $8\% \times [12 \times \$925] = \$888$ .

### **Penalty**

[28] A penalty was sought for the failure to provide a written employment agreement. Section 65 of the Act was cited as the basis for such an order. However while s 65(1) sets out the obligation to provide a written employment agreement, it does not contain the requisite provision regarding penalties for failure to comply. The now-repealed s 64 formerly contained such a provision, which extended to s 65 through the references in s 64(2).

[29] There was no request for a penalty under any part of s 63A.

[30] There will therefore be no order for the payment of a penalty.

### **Summary of orders**

[31] Chic-One is ordered to pay to Ms Syme:

- a. \$6,364 as reimbursement for remuneration lost as a result of her personal grievance;
- b. \$4,000 as compensation for injury to feelings as a result of her personal grievance;
- c. \$162.50 as wages for 3 March 2008; and
- d. \$888 as holiday pay.

[32] I further order that interest be paid on the sum identified in para (a) above calculated at 7.65% from the date of this determination to the date of payment, and on the sums identified in para (c) and (d) above calculated at 7.65% from 3 March 2008 to the date of payment.

### **Costs**

[33] Mr Nutsford also asked that I determine costs. He cited costs in the sum of \$843.75. Modest though the sum is, I have not been given a reason to award full costs. In addition, the investigation meeting took only an hour.

[34] On the other hand, Ms Syme is the successful party and is entitled to a contribution to her costs. Chic-One is further ordered to contribute to her costs of representation in the sum of \$400, and to reimburse her for the filing fee of \$70.

R A Monaghan

Member of the Employment Relations Authority

